

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Rulemaking to implement the provisions of
Public Utilities Code § 761.3 enacted by
Chapter 19 of the 2001-02 Second Extraordinary
Legislative Session.

Rulemaking 02-11-039
(Filed November 21, 2002)

**ASSIGNED COMMISSIONER AND ADMINISTRATIVE LAW JUDGE
RULING (A) REGARDING REMAINING ISSUES AND
TECHNICAL MODIFICATIONS TO GO 167
AND (B) SETTING PHC**

This proceeding remains open to address limited items. In particular, these are: (a) whether there are any remaining issues, and (b) whether technical modifications are necessary to General Order (GO) 167. (Decision 04-12-049, *mimeo.*, page 44 and Ordering Paragraph 6.)

Two approaches will be used to accomplish this. First, written comments will be used to identify issues and technical modifications. Second, a prehearing conference (PHC) will be held.

1. Written Comments

For the reasons stated in Attachment A, this ruling preliminarily finds that all issues identified in the Scoping Memos dated February 19, 2003 and May 2, 2003 have now been addressed and resolved. One possible minor technical modification to the title of GO 167 is identified. Parties may comment.

To be most useful, comments should be specific. For example, the specific issue yet to be resolved should be identified, including a reference to the issue as stated in the Scoping Memo. The pleading should show why resolution of the issue is necessary before the proceeding may be closed, and generally what the

party would submit in a subsequent showing on the issue. The party should also include a proposed procedure and schedule.¹

Similarly, specific proposed technical modifications should be stated. If the specific proposed technical modification cannot be stated in the comment, then the party should state the subject area and make a specific proposal regarding process and schedule.²

2. Prehearing Conference

The Commission adopted GO 167 after careful consideration. This is now the regulatory structure for implementing and enforcing California's operation and maintenance standards for electric generation facilities and powerplants.

Stakeholders are learning from their initial experiences with GO 167. Based on the program's adopted structure and stakeholders' experiences, it might be useful to use what has been adopted and learned thus far to:

(a) examine whether or not there are ways to mitigate what might otherwise become future conflicts in implementation and enforcement, and (b) make incremental improvements in the program to increase benefits and reduce costs within the adopted GO 167 structure. Related ideas and the use of mediation are discussed further in Attachment B.

A PHC will be held on April 12, 2005 to discuss this approach.

Stakeholders are encouraged to attend. President Peevey will attend to discuss this from the point of view of the Assigned Commissioner, and help determine

¹ For example, a proposed schedule for (a) filing and service of comments and reply comments, or (b) service of proposed testimony and proposed rebuttal testimony, hearing, briefs.

² For example, a proposed schedule for (a) filing and service of subsequent comments and reply comments, or (b) workshops followed by filing and service of written comments and reply comments.

whether or not stakeholders have sufficient interest to merit initiating this process.

IT IS RULED that:

1. Respondents and parties may comment on whether or not (a) issues remain for resolution in this proceeding and (b) technical modifications are necessary or desirable to General Order 167. Comments shall be filed and served within 14 days of today, and reply comments within 7 days of the date of comments. To be most useful, comments shall be specific, and shall include the items stated in the body of this ruling.

2. A prehearing conference shall be held at 1:30 p.m. on April 12, 2005 in the Commission Courtroom, State Office Building, 505 Van Ness Avenue, San Francisco, California.

Dated March 17, 2005, at San Francisco, California.

/s/ MICHAEL R. PEEVEY

Michael R. Peevey
Assigned Commissioner

/s/ BURTON W. MATTSON

Burton W. Mattson
Administrative Law Judge

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ATTACHMENT A

REMAINING ISSUES FOR RULEMAKING 02-11-039 AND TECHNICAL MODIFICATIONS TO GENERAL ORDER 167

Rulemaking 02-11-039 remains open to address limited items. In particular, these items are: (a) whether there are any remaining issues and (b) whether technical modifications are necessary to General Order (GO) 167. (Decision (D.) 04-12-049, Ordering Paragraph 6.) The process of parties commenting on these items will not be used to relitigate GO 167. For the reasons discussed below, it is preliminarily concluded that all issues identified in the Scoping Memos have been addressed and resolved. Further, one technical modification is proposed.

1. Remaining Issues

The Scoping Memos established four phases for this matter. (Scoping Memos dated February 19, 2003 and May 2, 2003.) The issues in all four phases are now resolved.

Phase 1: Phase 1 involved implementation and enforcement of Maintenance Standards. This has been accomplished by the Commission's adoption of GO 167. (D.04-05-017, D.04-05-018 and D.04-12-049.)

Phase 2: Phase 2 encompassed two parts.

Phase 2.1: Phase 2.1 involved logbook requirements. This has been accomplished by the Commission's adoption of logbook standards for thermal powerplants and hydroelectric generating facilities. (D.04-05-017 and D.04-05-018.)

Phase 2.2: Phase 2.2 involved Commission enforcement of protocols for the scheduling of powerplant outages of the California System Independent System Operator (CAISO or ISO). This has been accomplished by the Commission's adoption of GO 167. (D.04-05-018.)

Phase 3: Phase 3 encompassed three parts.

Phase 3.1: Phase 3.1 involved the implementation and enforcement of Operation Standards. This has been accomplished by the Commission's completion of GO 167, with inclusion of Operation Standards in December 2004. (D.04-12-049.)

Phase 3.2: Phase 3.2 involved the Legislature's finding and declaration that:

"It is in the public interest that the Public Utilities Commission seek enforcement capability from the Federal Energy Regulatory Commission [FERC] regarding the private generator agreement to provide for broader state control of operational activities of generation facilities in the state." (Senate Bill X2 39, Section 1(c).)

This subject has perhaps been both the most controversial and most addressed matter in the entire proceeding. Parties began addressing jurisdiction and the Commission's role relative to FERC as early as their first Prehearing Conference Statements. (See, for example, Prehearing Conference Statements dated December 6, 2002 and December 12, 2002.) The issue was raised directly or indirectly (e.g., by reference to prior comments) in nearly all pleadings. A workshop held in March 2003 considered this issue, among others. After the workshop, further written comments and reply comments were filed regarding how Maintenance Standards could be enforced cooperatively with CAISO, utilizing FERC-approved tariffs.

The Commission discussed this subject and determined its approach in each of several decisions.³ The adopted approach is one of cooperation and comity while the Commission fulfills its duties and obligations. It recognizes that the Commission has different underlying authorities and responsibilities than those of other entities and agencies, even if the subject areas overlap. It determines that cooperation is in the best interest of all affected entities, but that the Commission does not concede or limit its authority.

In particular with respect to FERC, the Commission has said that:

“...FERC and California have different purposes for taking actions that address closely related activities, namely, those concerning the maintenance and operation of power plants owned by EWGs [exempt wholesale generators]. As we discuss in that decision [D.04-05-017], Congress has expressly withheld from FERC authority over facilities used for the generation of electric energy, while assigning to FERC responsibilities relating to wholesale price formation. We consider it important to try to harmonize the efforts we are taking in this and related decisions to implement California’s generation facility maintenance and operation standards with those responsibilities of FERC....Toward this end, and in a spirit of comity with our federal counterpart, FERC, we shall forward the standards that we adopt in this Decision to the ISO with a request that the ISO submit these adopted standards to FERC for approval as amendments to the ISO’s tariff....We emphasize that we take this action solely in a spirit of cooperation and comity. As noted just above, it is desirable for all concerned that there not be conflicting sets of rules that serve different regulatory purposes but may address closely related subjects, in this case, those relating to generation maintenance and operation activities. We emphasize, however, that by this action, we do not, nor do we intend to, concede

³ For example, see D.04-05-017, *mimeo.*, at pp. 7-19, 27-28, 34-35, Finding of Fact 6, Conclusions of Law 4-12, Ordering Paragraph (OP) 6. Also see D.04-05-018, *mimeo.*, at pp. 6-11, 16-21, 27-29, 31, 32-33, Findings of Fact 1 and 11, Conclusions of Law 2-7, OP 5. Also see D.04-12-049, *mimeo.*, at pp. 31, 36-39, Conclusion of Law 18, OP 4.

or limit any authority of the State of California, either directly or indirectly.” (D.04-05-018, *mimeo.*, page 19-21.)

On May 13, 2004, the Commission’s President wrote the FERC Chairman regarding this approach and specifically said: “I would appreciate your assurance that the jurisdictional approach embodied in our decisions [D.04-05-017 and D.04-05-018] is acceptable to you.” On June 30, 2004, the FERC Chairman responded saying: “...I do not believe it is necessary to include the CPUC’s O&M [operation and maintenance] standards for thermal generators in the CAISO tariff.” At least preliminarily, it appears that nothing further is needed relative to FERC.

The Commission continues to send its decisions to the CAISO “with a request that the CAISO submit these adopted standards to the Federal Energy Regulatory Commission for approval as amendments to the CAISO’s tariff.” (D.04-12-049, OP 4.) The Commission may continue to do so, unless and until it hears otherwise from the CAISO or the full FERC, or in some other respect decides to change its approach.

Thus, it appears that the issues in Phase 3.2 have been addressed and decided. That is, the “broader state control of operational activities of generation facilities in the state” believed by the Legislature to be in the public interest is met by the Commission’s exercise of its authority. It is further met by the Commission’s continuing approach of cooperation and comity with other entities and agencies. In particular, it is met by the Commission seeking incorporation of operation and maintenance standards in the CAISO’s FERC-approved tariff.

Phase 3.3: Phase 3.3 involved ensuring that facilities remain available and operational. The facilities include those to be disposed of pursuant

to §§ 455.5, 851 or 854,⁴ or those already disposed of in proceeding pursuant to § 851. This has been accomplished by the Commission's adoption of GO 167. (D.04-05-018.) In particular, GO 167 applies to all powerplants in California, including both those to be disposed of, or which have been disposed of, unless specifically exempted (e.g., nuclear powerplants, qualifying facilities, self-generation at the customer site). Importantly, powerplants disposed of pursuant to § 851 are EWGs in most, if not all, cases. The Commission has specifically found EWGs to be subject to GO 167 (unless exempted, such as self-generation at the customer site). (D.04-05-017.)

Phase 4: Phase 4 involved implementation and enforcement of General Duty Standards for Operation and Maintenance (GDS). This has been accomplished by the Commission's adoption of GO 167. Specifically, the Commission initially implemented and enforced certain GDSs. (D.04-05-017 and D.04-05-018.) It subsequently decided to sunset implementation and enforcement of GDS as separate standards, but incorporated GDS as necessary and appropriate into other parts of GO 167 for ongoing implementation and enforcement. (D.04-12-049.)

2. Technical Modifications

The Commission took several actions in its most recent decision to streamline, clarify, make parallel, and correct errors in various parts of GO 167. (D.04-12-049.) For example, appendices were reordered for streamlined and parallel treatment, terms were modified for consistency, and errors were corrected. In addition to a GO that is technically clear and correct, the Commission seeks "a relatively compact, focused and streamlined GO that is

⁴ Unless stated otherwise, all statutory references are to the Public Utilities Code.

most useful to the regulated community and the Commission.” (D.04-12-049, *mimeo.*, page 11.) Except for one minor change, no further changes or modifications are known to be necessary at this time to accomplish these goals.

One technical modification may be desirable. That is to change the title of GO 167 from “Enforcement of Maintenance and Operation Standards for Electric Generation Facilities” to “Operation and Maintenance Standards for Electric Generation Facilities.” This will streamline the title (e.g., rather than add “implementation” with “enforcement” to be complete it will simplify the title while still stating the subject area of the General Order). It will also make “operation and maintenance” parallel with the most common usage of the two terms.

(End of Attachment A)

ATTACHMENT B

MITIGATION OF POSSIBLE FUTURE CONFLICTS ALONG WITH PROGRAM IMPROVEMENTS

After careful consideration, the Commission adopted General Order (GO) 167 for the purpose of implementing and enforcing operation and maintenance standards for California's electric generation facilities and powerplants. Consistent with legislative findings and law, the Commission is using this approach to: (a) maintain and protect public health and safety, (b) ensure that these facilities are effectively and appropriately maintained and efficiently operated, and (c) ensure electrical service reliability and adequacy. (Decision (D.) 04-05-017, *mimeo.*, page 11.)

Implementation and enforcement of a program of such breadth and importance may produce some differences of opinion. Stakeholders are now gaining actual experience with GO 167. It may be possible to use that experience to consider ways to prevent and resolve future conflicts while still meeting essential program goals. Stakeholders might also be able to agree on program improvements to increase benefits and efficiencies while reducing costs. In particular, interests might be advanced by using mediation for preventative conflict resolution and incremental program improvements.

In this endeavor, stakeholders, including the Commission, share several common interests. For example:

1. **Safe and reliable electricity service for California's businesses and residents:** According to the Commission:

"It is critical to California's economy, public health and public safety, however, that its electricity system be available and reliable. Parties share this belief:

"...it cannot be stressed too strongly that this Commission and electric generators share a common goal: **to ensure that generation in California is available when needed to meet customers' demand for electricity.**" (West Coast Power (WCP) Comments dated October 6, 2004, page 3, emphasis in original.)

"DENA [Duke Energy North America] reiterates its shared interest with the Commission in providing California with efficient and reliable sources of power." (DENA Comments October 6, 2004, page 6; also in DENA Supplemental Comments November 3, 2004, page 7.)" (D.04-12-049, mimeo., page 4.)

2. **Cost minimization:** All stakeholders benefit by minimizing the cost of implementation and enforcement of the goals and requirements embodied in Pub. Util. Code § 761.3 and GO 167.
3. **Certainty:** All stakeholders benefit by increased certainty.
4. **Good public relations:** All stakeholders would like to be viewed favorably.
5. **Level Field:** All stakeholders benefit from uniform implementation and enforcement, with all generating asset owners (GAOs) on a level playing field in providing safe and reliable electric service in California.
6. **Other:** Other shared interests are likely to be identified.

The accumulating body of experience might assist stakeholders build upon shared interests to accomplish the public interest objectives and program goals contained in Pub. Util. Code § 761.3 and GO 167. Several options and

alternatives might be responsive to the needs, responsibilities and interests of generators, the Commission, the public, and others.

A prehearing conference (PHC) will be held to consider whether or not stakeholders would like to engage in mediation. This process will not be used to re-litigate GO 167. Rather, it would be to build upon the structure adopted in GO 167 for the purpose of anticipating and resolving what might otherwise become future conflicts. It would be to identify points of conflict, and discuss ways to prevent or preemptively resolve those conflicts. It would also be to identify incremental improvements within the existing structure to increase benefits and reduce costs.

The objective would be to make GO 167 work in the best possible ways at the least possible costs for all stakeholders. There is, of course, no guarantee that the mediation would result in a stakeholders' proposal, or that it would be adopted by the Commission. Nonetheless, the process, if undertaken, could result in improvements and benefits for all stakeholders. Characteristics of such mediation would include:

1. **Voluntary:** Participation would be voluntary, and the process could be halted at any time by the mediator or participants if it is not advancing shared interests.
2. **Confidential:** All discussions would be confidential, so stakeholders could be comfortable in examining all issues and options.
3. **Time Limited:** The process would be used for a specific period of time, and would not be indefinite.

Stakeholders can explore with the Assigned Commissioner and Administrative Law Judge at the PHC whether or not to further consider mediation.

(End of Attachment B)

CERTIFICATE OF SERVICE

I certify that I have by mail, and by electronic mail to the parties to which an electronic mail address has been provided, this day served a true copy of the original attached Assigned Commissioner and Administrative Law Judge Ruling (A) Regarding Remaining Issues and Technical Modifications to GO 167 and (B) Setting PHC on all parties of record in this proceeding or their attorneys of record.

Dated March 17, 2005, at San Francisco, California.

/s/ ERLINDA PULMANO

Erlinda Pulmano

N O T I C E

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